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No. 05-1443

In the Supreme Court of the United States

MOTION SYSTEMS CORPORATION, PETITIONER

v.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the President's determination, pursuant to statutory authority under 19 U.S.C. 2451(k)(1), not to impose restrictions on certain imports from the People's Republic of China because such restrictions are "not in the national economic interest of the United States" is subject to nonstatutory judicial review to determine whether the President had a sufficient basis for his decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 437 F.3d 1356. The opinion of the Court of International Trade (Pet. App. 45a-87a) is reported at 342 F. Supp. 2d 1247.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2006. The petition for a writ of certiorari was filed on May 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In connection with the accession of the People's Republic of China (PRC) to the World Trade Organiza-

tion, Congress added Section 421 to the Trade Act of 1974. See Act of Oct. 10, 2000, Pub. L. No. 106-286, § 103(a)(3), 114 Stat. 882 (codified at 19 U.S.C. 2451). That Section provides a safeguard mechanism applicable only to imports from the PRC. Section 421 allows the President to impose "increased duties or other import restrictions" in order to "prevent or remedy the market disruption" caused by products imported from the PRC. 19 U.S.C. 2451(a).

Section 421 directs the United States International Trade Commission (ITC) to conduct an "investigation to determine whether products of the People's Republic of China are being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products." 19 U.S.C. 2451(b). Proceedings before the ITC include publication of notice of the commencement of proceedings and public hearings, at which interested parties are permitted to present evidence, to comment upon any adjustment plan submitted, to respond to the presentations of other parties, and otherwise to be heard. 19 U.S.C. 2451(b)(5).

If the ITC renders an affirmative determination of market disruption, it is required to "propose the amount of increase in, or imposition of, any duty or other restrictions necessary to prevent or remedy the market disruption," 19 U.S.C. 2451(f), and to "submit a report to the President and the [United States] Trade Representative," 19 U.S.C. 2451(g)(1), detailing its market disruption determination and proposed remedy. The ITC's report must describe the effects of implementing its recommendation on "the petitioning domestic industry, on other domestic industries, and on consumers," as well as

the effects of not implementing the recommendation on the petitioning and other domestic industries, the petitioning industry's workers, and the communities where its facilities are located. 19 U.S.C. 2451(g)(2)(D).

Section 421 next directs the United States Trade Representative (USTR) to publish notice of any proposed remedy and of the opportunity, including a public hearing, if requested, for any interested party to submit comments regarding the appropriateness of the proposed measure and whether it would be in the public interest. 19 U.S.C. 2451(h)(1). At the same time, the USTR is instructed to consult with the PRC, pursuant to 19 U.S.C. 2451(j), about the possibility of reaching a mutual agreement to remedy the market disruption. If no bilateral agreement is reached, the USTR provides a "recommendation to the President concerning what action, if any, to take to prevent or remedy the market disruption." 19 U.S.C. 2451(h)(2).

After receiving the USTR's recommendation, "the President shall provide import relief * * * unless the President determines that provision of such relief is not in the national economic interest of the United States" or "would cause serious harm to the national security." 19 U.S.C. 2451(k)(1). In deciding whether to provide import relief, "the President may determine * * * that providing import relief is not in the national economic interest of the United States only if the President finds * * * adverse impact on the United States economy clearly greater than the benefits of such action." 19 U.S.C. 2451(k)(2). The statute does not provide for judicial review of the President's determination.

2. Petitioner is a domestic producer of pedestal actuators, which are component parts of electric scooters used by mobility-impaired people. Pet. App. 47a. Peti-

tioner filed a petition with the ITC seeking import relief pursuant to 19 U.S.C. 2451. The petition asserted that imports of pedestal actuators from the PRC were causing market disruption. In the Fall of 2002, the ITC, by a vote of three to two, issued an affirmative market disruption determination and proposed the imposition of quotas for a three-year period upon the importation of pedestal actuator imports from the PRC. *Pedestal Actuators from China*, USITC Pub. 3557, Inv. No. TA-421-1, at 1-2 & n.3 (Nov. 2002).

The USTR consulted with the PRC, pursuant to 19 U.S.C. 2451(j), but without reaching an agreement. Compl. ¶ 16. The USTR also accepted comments from interested parties and held a public hearing regarding possible remedies. *Id.* at ¶ 17. On January 2, 2003, the USTR submitted his recommendation to the President. *Id.* at ¶ 20.

On January 17, 2003, the President issued his determination that import restrictions should not be imposed on pedestal actuators from the PRC. *Presidential Determination on Pedestal Actuator Imports from the People's Republic of China* (Presidential Determination), 68 Fed. Reg. 3157. The President expressly found "that the import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action." *Ibid.* The President explained that he had concluded "that imposing the USITC's recommended quota would not likely benefit the domestic producing industry" because it would simply "cause imports to shift from China to other offshore sources." *Ibid.* Moreover, "[e]ven if the quota were to benefit the primary domestic producer, the cost of the quota to consumers, both the downstream purchasing industry and users of the downstream products, would substantially

outweigh any benefit to producers' income." *Ibid.* The President considered both the fact that there is a "significantly larger number of workers in the downstream purchasing industry [which might itself be forced to migrate production offshore] when compared with the domestic pedestal actuator industry," *ibid.*, and the fact that the burden of a quota would "negatively affect the many disabled and elderly" individuals who are the "ultimate consumers of pedestal actuators." *Id.* at 3158.

3. Petitioner filed suit in the Court of International Trade (CIT) asking the trial court to order the President to impose trade restrictions on pedestal actuators from the PRC. The government moved to dismiss on the ground that the CIT lacked jurisdiction to review the President's determination. Pet. App. 46a-47a.

The CIT denied the government's motion to dismiss, reasoning that it had jurisdiction pursuant to 28 U.S.C. 1581(i) to entertain direct actions against the President relating to trade matters. Pet. App. 56a-64a. The court sustained the Presidential Determination on the merits, however. Applying the three-pronged standard of review of Presidential actions described in *Maple Leaf Fish Co.* v. *United States*, 762 F.2d 86, 89, 90 (Fed. Cir. 1985), the CIT held that: (1) the President did not misconstrue the statute; (2) the President acted within his statutory authority; and (3) the President and the USTR adhered to the procedural requirements of Section 421. Pet. App. 69a-82a.

4. Petitioner appealed. After the case had been briefed and argued before a three-judge panel, the court of appeals ordered, sua sponte, that the appeal be heard en banc. *Motion Sys. Corp.* v. *Bush*, 140 Fed. Appx. 257 (Fed. Cir. 2005). After further briefing and reargument, the en banc court held, in a per curiam opinion joined by

ten of the twelve participating judges, that the CIT lacked jurisdiction over petitioner's challenge to the Presidential Determination. Pet. App. 1a-44a.

The court of appeals first held that there was no statutory basis for review of the President's decision. The CIT's jurisdictional statute, 28 U.S.C. 1581(i), permits judicial review of certain trade or tariff claims pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See *Shinyei Corp. of Am.* v. *United States*, 355 F.3d 1297 (Fed. Cir. 2004); 28 U.S.C. 2631(i) (suits pursuant to Section 1581(i) may be "commenced by any person adversely affected or aggrieved by agency action under section 702 of title 5"); 28 U.S.C. 2640 (in suits pursuant to Section 1581(i), the CIT "shall review the matter as provided in section 706 of title 5"). The court of appeals concluded that the President's determination was not subject to review pursuant to that statutory authority because the APA applies only to "agency action" and the President is not an "agency." Pet. App. 6a (citing *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992)).

The court of appeals further held that it could not exercise "nonstatutory" review over petitioner's challenge to the President's determination. Invoking this Court's decisions in *Dalton* v. *Specter*, 511 U.S. 462 (1994), *United States* v. *George S. Bush & Co.*, 310 U.S. 371 (1940), and *Dakota Central Telephone Co.* v. *South Dakota ex rel. Payne*, 250 U.S. 163 (1919), the court of appeals concluded that the President's exercise of his discretion under Section 421 to determine whether import relief is in the national economic interest is not subject to judicial review. Pet. App. 7a-12a. The USTR's actions were also not subject to review, the court held, because they "were not final, but only recommendations

for Presidential action." Pet. App. 12a-13a (citing *Franklin*, *505 U.S. at 798*).

Judge Gajarsa, joined by Judge Newman, concurred in the judgment. They would have held that the Presidential Determination was subject to review pursuant to the CIT's jurisdictional statute, 28 U.S.C. 1581(i). Pet. App. 20a-42a. On the merits, they would have affirmed the CIT's conclusion that petitioner had failed to establish either that the President misunderstood Section 421 or that he acted outside his delegated authority. *Id.* at 42a-43a.

ARGUMENT

Petitioner asks the Judicial Branch, pursuant to "nonstatutory judicial review" (Pet. 6), to overturn the President's decision not to impose trade barriers against certain imports from the PRC. Not surprisingly, petitioner can point to no case in which the courts have assumed so extraordinary a power without statutory authority. The court of appeals' conclusion that it lacked the power to review the President's exercise of his authority under Section 421 is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Significantly, petitioner does not urge before this Court the position of the concurring judges below. Whereas the two concurring judges believed that judicial review of the President's determination was within the jurisdiction of the CIT pursuant to 28 U.S.C. 1581(i), see Pet. App. 20a-42a, petitioner does not cite Section 1581(i) in the petition. Instead, petitioner urges the Court (Pet. 6) to grant certiorari to decide the question "whether nonstatutory judicial review" is available with

respect to the President's exercise of his discretion under Section 421.

Petitioner contends (Pet. 6-8) that review is necessary to resolve a conflict between the decision below and decisions of the District of Columbia Circuit. Contrary to petitioners' assertions, the court of appeals' decision does not conflict with either *Mountain States Legal Foundation* v. *Bush*, 306 F.3d 1132 (D.C. Cir. 2002), cert. denied, 540 U.S. 812 (2003), or *Chamber of Commerce of the United States* v. *Reich*, 74 F.3d 1322 (D.C. Cir. 1996). Even assuming that those decisions were correct, each made clear that the court was *not* faced with the question presented here.

In *Chamber of Commerce*, the D.C. Circuit found that it had authority to hear a suit to enjoin the Secretary of Labor from enforcing regulations he had adopted to implement an Executive Order, issued by the President pursuant to his authority under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 *et seq.*, barring federal agencies from contracting with employers that had hired permanent replacements for lawfully striking employees. 74 F.3d at 1324. In holding that the courts had authority to issue such relief, the D.C. Circuit distinguished this Court's decisions in *Dalton* v. *Specter*, 511 U.S. 462 (1994), and *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), each of which held that judicial review was unavailable with respect to certain Presidential determinations. The court of appeals observed that, in *Franklin*, "*only* the President's decision was called into question," 74 F.3d at 1329, and opined that the Court's hesitancy in *Dalton* "to review presidential action appears to be based on the special status of the President," *id.* at 1331 n.4. The court of appeals stressed that the plaintiff in *Chamber of Com-*

merce challenged the Secretary of Labor's implementation, through separate regulations, of the President's order. *Id.* at 1329; *id.* at 1331 n.4 ("here we are concerned with the long established non-statutory review of a claim directed at a subordinate executive official").

This case differs from *Chamber of Commerce* in precisely the same way that *Dalton* and *Franklin* did. Here, the roles of the ITC and USTR are merely to make nonfinal recommendations. Only the President may determine whether the provision of import relief "is not in the national economic interest of the United States" or "would cause serious harm to the national security." 19 U.S.C. 2451(k)(1). Moreover, when, as here, the President decides that he will *not* impose such measures, there is no implementation required of a subordinate executive official. Thus, unlike the plaintiff in *Chamber of Commerce*, petitioner seeks "to bring judicial power to bear directly on the President." 74 F.3d at 1331 n.4.

The D.C. Circuit's decision in *Mountain States* is likewise inapposite. The plaintiff there challenged Presidential Proclamations issued under the Antiquities Act of 1906, 16 U.S.C. 431 *et seq.*, which authorizes the President to designate as national monuments certain landmarks, structures, or objects of historic or scientific interest located on government land and to reserve the parcels of land on which the items are located. The plaintiff asked the court to undertake "factfinding * * * to ensure that substantial evidence existed to support the President's issuance of the Proclamations." 306 F.3d at 1134. After discussing decisions of this Court and the D.C. Circuit regarding the availability of nonstatutory review of Presidential action, *id.* at 1135-1136, the court of appeals ultimately concluded that the

case presented "no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority," because the complaint failed to allege facts to support the plaintiff's claim that the President had acted beyond his statutory authority. *Id.* at 1137. Plainly, then, there can be no conflict between the decision below and *Mountain States*, which reserved decision on the precise issue presented here.

Moreover, whereas both *Mountain States* and *Chamber of Commerce* involved purely domestic issues, the President's exercise of his authority under Section 421 implicates the Nation's foreign relations. It is evident from the face of the statute itself that Congress understood that the grant of import relief under Section 421 directly affects relations between this country and the PRC. For example, Section 421 specifically authorizes the President, through the USTR, to negotiate and enter into agreements with the PRC to prevent or remedy the market disruption found by the ITC. 19 U.S.C. 2451(j). Indeed, Congress specifically contemplated that the President might need to refuse import relief on the ground that it "would cause serious harm to the national security of the United States." 19 U.S.C. 2451(k)(1).

This Court's decisions confirm the unavailability of nonstatutory judicial review over the President's exercise of authority relating to foreign affairs. In an analogous case, *United States* v. *George S. Bush & Co.*, 310 U.S. 371 (1940), the Court held that it lacked authority to examine "the judgment of the President that the rates of duty recommended by the [Tariff] Commission are necessary to equalize the differences in the domestic and foreign costs of production." *Id.* at 379. The Court noted that "[n]o one has a legal right to the maintenance

of an existing rate or duty," *ibid.* (quoting *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 318 (1933)), and held that "the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review * * * than if Congress itself had exercised that judgment." *Id.* at 379-380. Similarly, in *Dakota Central Telephone Co.* v. *South Dakota ex rel. Payne*, 250 U.S. 163 (1919), the Court held that it was "beyond the reach of judicial power," *id.* at 184, to review the President's exercise of authority to seize telecommunications systems "whenever he shall deem it necessary for the national security or defense," *id.* at 181 (quoting J. Res. of July 16, 1918, ch. 154, 40 Stat. 904). See *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948) (President's decisions whether to approve or disapprove orders of the Civil Aeronautics Board are not reviewable because they "embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate"). For that reason as well, the decisions relied upon by petitioner are inapposite, and there is no conflict among the courts of appeals.

2. Petitioner also urges (Pet. 9) that review is necessary to clarify "whether *Dalton* repudiated all judicial review of allegedly ultra vires Presidential action." Contrary to petitioner's assertions, there is no evidence that the court of appeals failed to understand or apply faithfully this Court's holding in *Dalton*.

In *Dalton*, the Court distinguished "between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." 511 U.S. at 472. The Court noted its holding in *Franklin* that the "President's actions may * * * be reviewed for consti-

tutionality," *id.* at 469 (quoting *Franklin*, 505 U.S. at 801); *id.* at 473-474, but clarified that that exception does not encompass "every claim alleging that the President exceeded his statutory authority," *id.* at 474.

Although petitioner casts the issue presented here (Pet. 9) as one regarding the availability of "judicial review of allegedly ultra vires Presidential action," the court of appeals correctly concluded that petitioner makes "no colorable claim that the President exceeded his statutory authority." Pet. App. 9a. Section 421 specifically authorizes the President to withhold import relief if he determines that "the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action." 19 U.S.C. 2451(k)(2). The statute further directs that the President publish "reasons" for his determination. 19 U.S.C. 2451(*l*)(1). Here, it is clear that the President made the determination specified in the statute and published his reasons for so finding. See Pet. App. 52a-54a (summarizing and reproducing the President's decision and reasons).

Thus, as the court of appeals observed, petitioner's claim is not truly that the President acted without statutory authority, but that he made his determination "without evidentiary support," Pet. App. 9a, or, stated another way, "whether the President abused his discretion under section 421(k)," *id.* at 12a. See Pet. 4 ("The record provided no economic basis for the [President's] finding of an adverse impact on the United States economy clearly greater than the benefits of such action, * * * and neither court below examined the record to determine whether it supported the President's decision."); *id.* at 5 ("[t]he trial court decided not to review whether the record supported the decision to deny the

relief recommended by the ITC"). Even assuming, *arguendo*, as the Court did in *Dalton*, that "some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA," 511 U.S. at 474, it would not follow that the courts have authority to flyspeck the President's exercise of the precise discretion conferred on him by Congress, see *ibid.* ("where a claim 'concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power'") (quoting *Dakota Cent. Tel. Co.*, 250 U.S. at 184). Cf. *Mountain States*, 306 F.3d at 1134, 1137 (request for judicial review "to ensure that substantial evidence existed to support the President's issuance of [national monument] Proclamations" failed to state a claim "that the President acted beyond his authority under the Antiquities Act").

The court of appeals' application of this Court's holding in *Dalton* thus presents no occasion for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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